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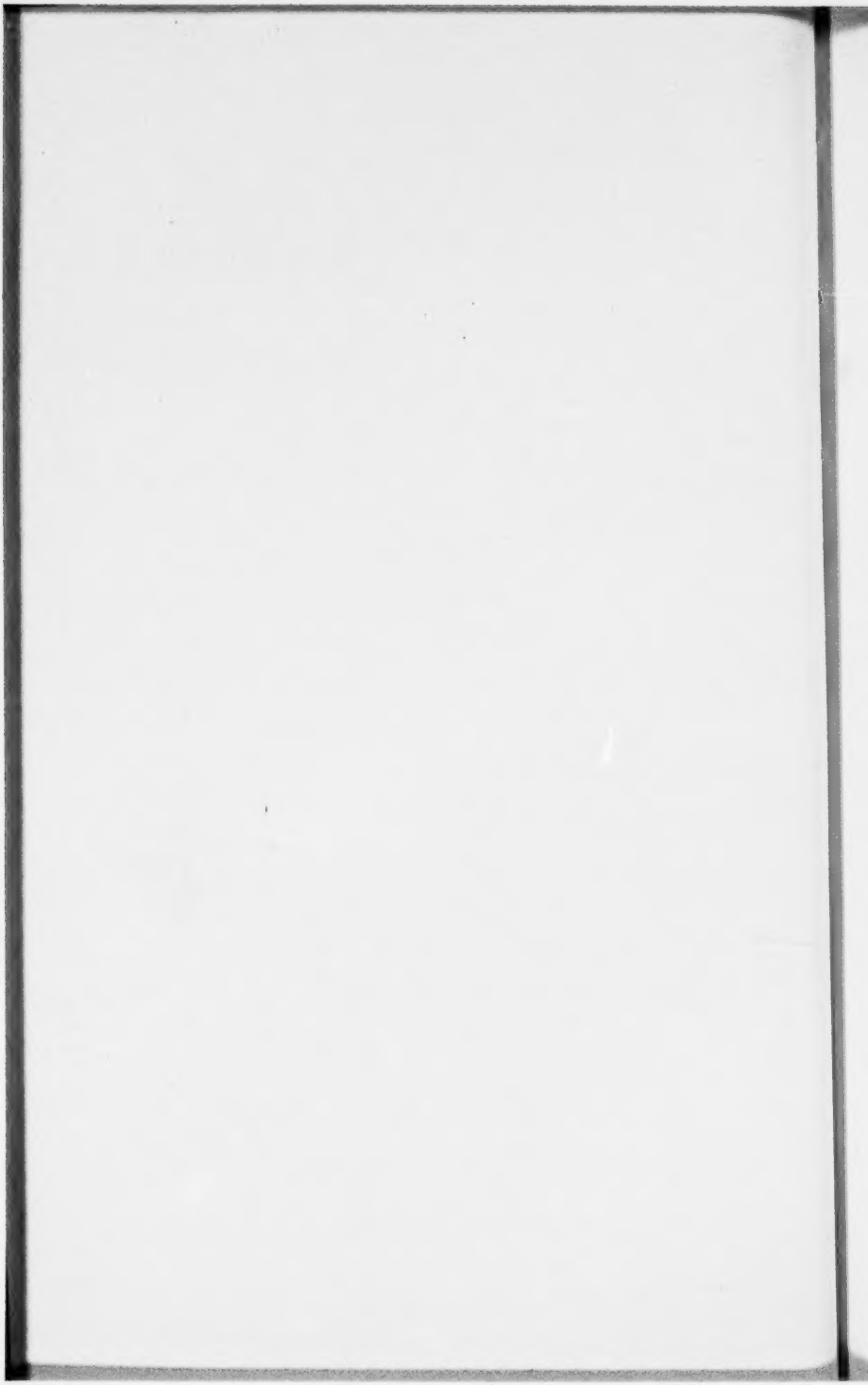

In the Supreme Court of the United States

OCTOBER TERM, 1941

No. 104

ADAH ALBERTY, TRADING AS ALBERTY'S FOOD PRODUCTS, ET AL., PETITIONERS

v.

FEDERAL TRADE COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE FEDERAL TRADE COMMISSION IN OPPOSITION

OPINION BELOW

The majority (R. 906–909) and concurring (R. 909–911) opinions in the Circuit Court of Appeals are reported in 118 F. (2d) 669.

JURISDICTION

The Circuit Court of Appeals entered its decree on March 26, 1941 (R. 912–918), and denied a petition for rehearing on April 21, 1941 (R. 919). The petition for writ of certiorari was filed May 26, 1941. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether findings by the Commission which are supported by substantial evidence are nevertheless unauthorized or illegal if there is a conflict in the evidence and some of the conflicting evidence consists of testimony given by witnesses subscribing to a particular theory of medication.[1]

STATUTE INVOLVED

Section 5 of the Federal Trade Commission Act, c. 311, 38 Stat. 719 (15 U. S. C., § 45), provides in part as follows:[2]

> That unfair methods of competition in commerce are hereby declared unlawful.
>
> * * * * *
>
> * * * the findings of the commission as to the facts, if supported by testimony, shall * * * be conclusive.

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[1] Petitioner also seeks to present the question whether the trial examiner erred in refusing to allow petitioner's counsel to examine a document used by a Commission witness to refresh his recollection. As we point out later (*infra*, pp. 8–9), the testimony given after examination of the document did not relate in any way to the portions of the Commission's order which petitioner is attacking and the question sought to be raised is therefore outside the issues in this proceeding.

[2] The Commission instituted this proceeding before, but concluded it after, Section 5 was amended by the act of March 21, 1938, c. 49, 52 Stat. 111 (15 U. S. C., Supp. V, § 45). The amendments are not pertinent to the questions presented in this case.

STATEMENT

The Commission instituted a proceeding under Section 5 of the Federal Trade Commission Act by a complaint charging petitioner with selling in interstate commerce some 20 baby foods and alleged health preparations by means of numerous specified false and misleading representations (R. 2–11). Petitioner in her answer admitted that in these sales she was in substantial competition with various other concerns engaged in the interstate sale of like products (R. 3, 14), and near the beginning of the hearings petitioner stipulated that she had made a wide variety of exaggerated and misleading statements constituting the use of unfair methods of competition (R. 142–160).

After an extended hearing the Commission found that various representations by which petitioner promoted the sale of her products were false, deceptive, or misleading (R. 19–34) and it entered a cease and desist order prohibiting such representations in connection with interstate sales (R. 36–41). The prohibited representations are set forth in 21 separate paragraphs of the order. Of the 21, petitioner questions the validity of only five (R. 906–907).[3]

[3] Paragraphs (1), (3), (5), (6), and (7) (R. 36, 37–38). Among important provisions of the order not attacked by petitioner are those barring her from representing that her products increase or stimulate sex activity (pars. (4), (9), and (10), (13) in conjunction with (14), (15)) (R. 37, 38, 39–40).

The court below held that the Commission's findings "are supported by substantial evidence and hence are conclusive" (R. 908). The court pointed out that not only had the Commission not rejected the testimony of adherents of the homeopathic school of medicine but that the testimony of such adherents gave some support for the findings (*id*). The concurring opinion deals with this aspect of the case somewhat more fully and reaches the same conclusion (R. 909–911).

ARGUMENT

I

Petitioner's contention that the Commission erred in basing its findings upon the testimony of representatives of one school of medical thought, in disregard of testimony given by representatives of another school, constitutes an admission that there is evidence to support the findings.[4] The law is settled that where there is such evidence the Commission's findings are conclusive and that, upon judicial review, the question of the weight of the evidence is not open for consideration. *Federal Trade Commission* v. *Algoma Lumber Co.*, 291 U. S. 67, 73. Furthermore, certiorari will ordinarily not be granted merely to review the question of whether there is sufficient evidence to sustain the

[4] See also references to evidence supporting the findings, Appendix A of the petition for certiorari, p. 13.

findings of an administrative body. *National Labor Relations Board* v. *Waterman Steamship Corp.*, 309 U. S. 206, 208.

Petitioner seems to contend that the representations which she made have the support of one school of medical thought, that the Commission is not authorized or competent to determine which of two conflicting medical theories is valid, and that the Commission therefore acted arbitrarily in finding that representations which are endorsed by a recognized school of medical thought are false and misleading. The short answer to this contention is that it assumes a state of facts—that those subscribing to homeopathic theories of medication endorse the representations made by petitioner—which the evidence does not establish. That the case does not present the legal issue which petitioner seeks to raise is clearly stated in the concurring opinion in the court below, as follows (R. 911):

> There is no showing by homeopathic doctors generally that these alleged remedies, as put together by petitioner, have the support or endorsement of the homeopathic school. At most there is testimony by doctors of that school that some one or more of the ingredients used in several of the preparations are recognized as having therapeutic value. * * * In short, petitioner's theory of the case does not substantially fit the facts.

Certain evidence warranting the above observations is summarized below.[5]

But petitioner's contention, even if the necessary factual foundation therefor had been laid, would still be without merit. It is as much within the province of the Commission to determine an issue of fact which requires consideration of conflicting testimony by medical experts as to determine any other factual issue involving the weighing of conflicting evidence.[6] In *Federal Trade Commission* v. *Raladam Co.*, 283 U. S. 643, the Commission's findings as to misrepresentation were based upon the testimony of medical experts and their testimony was conflicting.[7] While this Court set aside the Commission's order upon the ground that there

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[5] Petitioner's preparations generally contain numerous ingredients in minute quantities (R. 25–29, 911), but two of the three homeopaths upon whose testimony petitioner relies testified that the generally accepted homeopathic theory or practice was to prescribe drugs separately, not in combination (R. 756, 810).

One of the three homeopaths testified that he had never used the combination of ingredients found in petitioner's phosphate pellets (R. 757), in her No. 3 tablets (R. 762), in her Cheno tablets (R. 763), in her herb laxative pellets (R. 763–764), or in her Alberty's formula (R. 764–765). The cross-examination of the other two homeopaths was not as inclusive, but each of them when questioned as to the phosphate pellets testified that he had not used this particular combination of ingredients (R. 795–797, 809–810).

[6] *Justin Haynes & Co., Inc.* v. *Federal Trade Commission*, 105 F. (2d) 988, 989 (C. C. A. 2d).

[7] See *Raladam Co.* v. *Federal Trade Commission*, 42 F. (2d) 430, 433–434 (C. C. A. 6th).

was no proof that the respondent's practices were injurious to actual or potential competitors, it stated (p. 646) that the Commission's findings as to misrepresentation were "supported by evidence" and that if such findings "were all that is necessary to give the Commission jurisdiction, the order could not successfully be assailed."

In *E. Griffith Hughes, Inc.* v. *Federal Trade Commission,* 77 F. (2d) 886 (C. C. A. 2d), this Court denied a petition for writ of certiorari which presented substantially the same question as that urged in the present case (296 U. S. 617).

The cases cited by petitioner seem wide of the point. *American School of Magnetic Healing* v. *McAnnulty,* 187 U. S. 94, was a proceeding to enjoin a fraud order issued by the Postmaster General under a statute authorizing him to prohibit obtaining money through the mails by means of "false or fraudulent" representations. The bill alleged that complainant's business was founded on the proposition that human ills can be cured through proper exercise of the faculties of the brain and mind and was "confined to practical scientific treatment" based on this doctrine. This Court, treating these allegations as statements of fact, held that it was erroneous to sustain a demurrer to the bill and it remitted the case to the District Court for trial upon the merits. The decision has no application to a proceeding under section 5 of the Trade Commission Act to prohibit unfair methods of competi-

tion. In such a proceeding, "innocence of motive" is no defense and the statute applies to "misrepresentation, however innocently made." *Federal Trade Commission* v. *Algoma Lumber Co.*, 291 U. S. 67, 81.

Seven Cases v. *United States*, 239 U. S. 510, upon which petitioner also relies, was a proceeding to condemn certain drugs as being misbranded, the statute providing that a drug was misbranded when there was an accompanying "false and fraudulent" statement regarding its curative effect. The Court sustained the validity of the statute and of the libel filed thereunder, saying (p. 517) that there obviously could be false and fraudulent representations with respect to curative effect and that whether such representations had been made or not was a question of fact to be determined upon the evidence like any other material fact.

II

Petitioner complains of the trial examiner's refusal to permit her counsel to examine a document which a Commission witness had used to refresh his recollection. The testimony thus refreshed concerned the falsity of the case history, as advertised by petitioner, of a user of her products (R. 413, 416–419, 422–425; see also R. 101–102). The only paragraph of the Commission's order to which this testimony is relevant is paragraph (19) which prohibits advertising by means of false case histories (R. 40). Since in the court below petitioner did

not specify error as to this paragraph (R. 906–907), any possible error in the examiner's ruling lies outside the issues presented to this Court. Furthermore, as the court below said, petitioner failed to make any showing of prejudice (R. 909). The witness stated that he had an independent recollection of the interview concerning which he testified and that his purpose in examining his notes of the interview was to make certain that his testimony would be correct (R. 419).[8]

CONCLUSION

The petition for a writ of certiorari presents no question requiring review by this Court and we therefore respectfully submit that it should be denied.

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JUNE 1941.

[8] The Commission's counsel waived any objection to inspection by petitioner's counsel, but the examiner felt bound by the Commission's general rule that reports of interviews by members of its staff are to be held confidential (R. 417–418, 420–421).

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